THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS 78711

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ATTORNEY GENERAL

May 9, 1977

Honorable Joe A. Hubenak
Texas House of Representatives
Austin, Texas

Letter Advisory No. 140

Re: Constitutionality of H.B. 1400, the "Texas Gas for Irrigation Act."

Dear Representative Hubenak:

You have asked whether House Bill 1400 is constitutional. The bill, titled the "Texas Gas for Irrigation Act," relates to the provision of natural gas for agricultural purposes, and, according to its declaration of policy, is a soil conservation measure. You also inquire about the constitutionality of the committee substitute.

Both versions of the bill apply to any person, firm, or corporation that is producing or claims the right to produce natural gas from a gas well. The bill requires the producer to sell to the person farming the surface estate enough gas to pump water from underground sources in order to irrigate the surface, thereby protecting it from erosion. The mineral operator is not required to provide more than one-eighth of the volume of gas produced or authorized to be produced from the well. Connections and equipment are to be provided at the sole risk and expense of the surface operator. A mineral operator who fails to comply with any duty imposed by the Act is liable to the surface operator for all damages arising from his failure, including diminished yield.

The two versions of the bill differ significantly in the procedures they establish for achieving their common goals. The original version requires the mineral operator to make gas available at the request of the surface operator, and provides for compensation at the same price per unit received for natural gas marketed from the same well. There is no provision for administrative supervision of the transactions proposed by the Act. The committee substitute provides that the prices, terms and conditions upon which natural gas is to be made available are to be determined by

negotiation between the parties. In the event of disagreement, either party may apply to the Railroad Commission to fix the terms of the sale. In making its decision, the Commission is to consider the surface operator's need for the natural gas for the purposes of irrigation and soil conservation, the cost of other power sources, the value of the gas, the operation of the well in accordance with conservation practices, and all other considerations relevant to achieving the purposes of the Act. It also provides for appeal from a decision of the Commission.

A bill virtually identical with the committee substitute was considered in two attorney general opinions issued in 1957. See Attorney General Opinions WW-84, WW-29 (1957). Attorney General Opinion WW-84 discussed the bill at length, considering the following constitutional issues: (1) whether the bill authorized the taking of property for a public use within the fifth and fourteenth amendments to the United States Constitution and article 1, section 17 of the Texas Constitution; (2) whether it provided procedural due process, U.S. Const. amend. 14; Tex. Const. art. 1, § 19; (3) whether it would impair the obligation of contracts, U.S. Const. art. 1, § 10; Tex. Const. art. 1, § 16; (4) whether it would create an unwarranted interference with interstate commerce, U.S. Const. art. 1, § 8, and (5) whether it denied any equal protection, U.S. Const. amend. 14; Tex. Const. art. 1, § 19.

Attorney General Opinion WW-84 analyzed the bill as a grant of the eminent domain power to individuals and corporations. It found that it permitted the taking of gas only where the public purpose of irrigation and soil conservation would be served. Thus it did not authorize an unconstitutional taking of private property for private purposes. See, e.g., Clark v. Nash, 198 U.S. 361 (1905); Joiner v. City of Dallas, 380 F. Supp. 754, 766 (N.D. Tex.), aff'd. mem., 419 U.S. 1042 (1974); Housing Authority of City of Dallas v. Higginbotham, 143 S.W.2d 79 (Tex. 1940). The bill was found to be constitutional with respect to the other four issues as well.

We agree with the conclusions expressed by Attorney General Opinion WW-84 and also with its reasoning, although recent judicial pronouncements require us to amplify the discussion of the interstate commerce issue. The Supreme Court has said that a state measure that "operate[s] to withdraw a large volume of gas from an established interstate current whereby it is supplied to customers in other States"

would unconstitutionally burden interstate commerce. Federal Power Commission v. Louisiana Power & Light Co., 406 U.S. 621, 633 (1972). When a state's minimum price regulations for natural gas had such an effect on established interstate commerce, they were held unconstitutional. Federal Power Commission v. Corporation Commission of the State of Oklahoma, 362 F. Supp. 522 (W.D. Okla. 1973), aff'd mem., 415 U.S. 961 (1974). If the proposed legislation similarly diverted a large volume of gas from interstate commerce, it would be subject to attack on constitutional grounds. We believe, however, that the Railroad Commission will have the opportunity, in the process of resolving disputes under the Act, to prevent such large scale diversions from occurring. Although no one is required to appeal to the Railroad Commission, that appellate mechanism is provided in the bill and is likely to be utilized in cases involving substantial amounts of gas. In arriving at its decision, the Commission can consider the effect of its orders on interstate commerce and endeavor to prevent the withdrawal of a large volume of gas from interstate markets. Phillips Petroleum Co. v. Jones, 147 F.Supp. 122, 126 (D. Okla. 1955).

In our opinion, the committee substitute for House Bill 1400 is facially constitutional. The original version is, however, subject to objection on constitutional grounds. It does not establish any machinery for determining whether persons who invoke its provisions are actually entitled to its benefits. It does not sufficiently limit its application to cases where its declared purpose of soil conservation will be served. Attorney General Opinion WW-29 noted in connection with the 1957 bill that it would be incumbent upon the Railroad Commission to determine that an applicant would use the gas for the public purpose of soil conservation, and that otherwise, the Commission's order might be held violative of article 1, section 17 of the Texas Constitution. In finding that a similar statute was not facially unconstitutional, a federal court relied in part on the power of a state commission to deny applications for gas where the land could not benefit from irrigation. Phillips Petroleum Co. v. Jones, supra at 126. House Bill 1400 does not provide any means short of a damages suit to determine whether the provision of gas in a particular case will serve the public purpose of soil conservation. The heavy liability provisions might cause compliance even in doubtful cases. We believe that the absence of administrative or judicial supervision of requests made under the original House Bill 1400 creates an unacceptable risk that it

will be applied to take private property for private purposes in violation of article 1, section 17 of the Texas Constitution and the fifth and fourteenth amendments of the federal Constitution. See Davis v. City of Lubbock, 326 S.W.2d 699, 706 (Tex. 1959).

We also believe that the original version of House Bill 1400 fails to provide the mineral operator with procedural due process. He has no opportunity to be heard on whether the act applies to him, and if so, whether the compensation it provides is adequate. See Joiner v. City of Dallas, supra at 765; Vogt v. Bexar County, 23 S.W. 1045 (Tex. Civ. App. 1893, writ ref'd).

The original version of the bill provides that payments for gas shall be due within fifteen days after receipt of a statement. Article 1, section 17 of the Texas Constitution requires that when property is taken "except for the use of the State, such compensation shall be first made, or secured by a deposit of money. . . ." (Emphasis added). Thus the provision for delayed payment of compensation also violates the Constitution. McCammon & Lang Lumber Co. v. Trinity & B.V. Ry. Co., 133 S.W. 247 (Tex. 1911).

In summary, we conclude that House Bill 1400 is subject to question on constitutional grounds. A bill substantially similar to the committee substitute was determined to be constitutional by Attorney General Opinion WW-84. We agree with the conclusions of Opinion WW-84, and believe that the committee substitute to House Bill 1400 is constitutional.

Very truly yours,

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Attorney General of Texas

APPROVED:

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Opinion Committee